

No. 43848-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VADIM UVAROV,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. FACTS

The State/Respondent adopts as the factual statement the substantive facts as outlined in the Appellant's brief, with the following additions:

When Kathy Cook was admitted to the hospital on April 2, 2012, she took off her necklace, a pair of earrings and an engagement ring. RP 9¹. She put these items in her purse and gave the purse to the Defendant/Appellant, Vadim Uvarov. RP 9. Already inside the purse was a yellow gold Figaro bracelet that had belonged to Cook's late husband. RP 13.

When Cook returned from the hospital, she noticed items missing from both her purse and a jewelry box. Among the items she testified were missing, Cook included the following items and their respective values:

- | | | |
|--|---------------------|-----------|
| 1. Ring in the purse, | \$ 1,000 to \$1,500 | RP 13; |
| 2. Her mother's wedding ring, | \$ 6,000 | RP 14; |
| 3. Bracelet in the purse, | \$ 4,000 | RP 14; |
| 4. Black Hills, spiral hooped,
earring set, | \$ 285 | RP 18-19. |

Uvarov was last seen in the Cook home on April 4, 2012, by Robert Cook, Kathy Cook's son. RP 29. This was during the time Kathy Cook was in the hospital. RP 9 and 30.

Uvarov was in possession of the above-listed jewelry immediately before he gave it to Donita Hope. RP 53-56. Uvarov told Hope that the jewelry was actually his, and that Ms. Cook was keeping it for him. RP 55-56. In exchange for Hope cleaning the jewelry, Uvarov gave her Cook's Black Hills, spiral hooped earring set. RP 58, Exhibit 1.

¹ "RP" refers to the Verbatim Transcript of Proceedings dated July 24, 2012.

When Appellant Uvarov found out his former girlfriend, Sara Saxby, was speaking to the police about the investigation, he told Saxby that it would be in her best interest not to say anything to the cops. RP 64. When he told her that, his manner was, according to Saxby, "sort of intimidating." RP 65.

When Hope found out the earrings were stolen, she arranged to return them to Cook by giving them to Saxby, who then gave them back to Cook. RP 66, Exhibit 1.

II. ARGUMENT

A. THERE WAS A VALID, TACTICAL REASON FOR DEFENSE COUNSEL CHOOSING NOT TO OBJECT TO THE MENTION OF SENTIMENTAL VALUE.

Every competent trial attorney knows that by objecting to testimony, he or she underscores for the jury that testimony, for however brief a moment, regardless of the court's ruling. In this case, the fact that sentimental value was attached to the stolen items had to have been already assumed by the jury regardless of the testimony.

The stolen items in this case were jewelry. Sentimental value is intrinsic in jewelry. Jewelry is often obtained as a gift from a loved one. Rings, bracelets and earrings often have memories attached to them; memories of the place, circumstance and who the giver was. By not objecting to the testimony from Ms. Cook

regarding the sentimental value of the stolen jewelry, the defense attorney was merely downplaying what the jury already assumed.

B. THE SINGLE ISSUE IN THE APPELLANT'S BRIEF IS INEFFECTIVE ASSISTANCE OF COUNSEL. APPELLANT HAS FAILED IN HIS BURDEN TO PROVE THAT, BUT FOR COUNSEL'S ALLEGED DEFICIENT PERFORMANCE, THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

Assuming for argument that the failure to object was somehow deficient performance on the part of the defense attorney, there was no resulting prejudice. To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was not only deficient, the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below and objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982

(1988). If either element of the test is not satisfied, the inquiry ends. *Hendrickson*, 129 Wn.2d at 78.

Applying this standard to Mr. Uvarov's case, the overwhelming evidence points to Uvarov as the thief. He was in possession of the stolen property. He transferred this property to Ms. Hope. His implausible story was that the jewelry was actually his, and that Ms. Cook was keeping it for him. RP 55-56. In exchange for Hope cleaning the jewelry, he gave her Cook's Black Hills, spiral hooped earring set. RP 59, Exhibit 1. When Mr. Uvarov found out his former girlfriend, Sara Saxby, was speaking to the cops about the investigation, he told her that it would be in her best interest not to say anything to the cops. RP 64. When he told her that, his manner was, "sort of intimidating." RP 65. When Hope found out about the stolen earrings, she gave them to Saxby, who then gave them back to Cook. RP 66, Exhibit 1.

Appellant has not provided any evidence beyond his attorney's argument that the jury was somehow unduly swayed by the sentimental value of the jewelry as testified to by Kathy Cook. Appellant's brief, page 7. Appellant characterizes Cook's testimony as "extremely" emotional. Appellant's brief, page 7. The exact

wording of the brief is, “extreme emotional toll exacted by the theft.” Appellant’s brief, page 7.

But the transcript indicates that Cook testified the sentimental value was extreme, not the emotion the theft invoked. RP 20. There is no indication in the record that Cook cried on the stand, needed a break in her testimony, or was otherwise emotional as she testified. Moreover, one may argue that the simple facts of the case itself evoke more emotion than the mere mention of sentimental value. Uvarov violated a position of trust. He stole from a person who was a surrogate mother to him. He lied to others about where he got the jewelry, then he tried to intimidate his girlfriend when he found out she was speaking to the police. If any emotion was injected into this case at all, it was by virtue of the totality of the defendant’s acts, not the simple mention of sentimental value at trial.

The burden is on the Appellant to show that there was a reasonable probability that the outcome of the trial would have been different. *State v. Leavitt*, 111 Wn.2d at 72. As stated above, there was no question that the defendant was in possession of the stolen jewelry when he tried to have Ms. Hope clean it. He transmitted the stolen earrings to Ms. Hope in exchange for her

services. He had a key to the victim's home and was observed therein when she was in the hospital. When he found out his girlfriend was speaking to the police about the stolen property, he tried to prevent her from doing so. All of these facts point to his guilt, notwithstanding a casual mention of the sentimental nature of the stolen property. A jury would have found him guilty even if defense counsel had made the objection, and even if the court would have sustained the objection.

**C. UVAROV FILED A PRO SE STATEMENT OF
ADDITIONAL GROUNDS ON FEBRUARY 5, 2013.**

**1. There Is No Evidence In The Record That The
Officers Obtained Any Warrants Or Broke Into The
Defendant's Home.**

Defendant claims there were no arrest warrants. That is true. The officers arrested Uvarov outside his residence when Uvarov approached them. RP 38-41. No search warrant was applied for. RP 45-46. Uvarov's home and vehicle were not searched. RP 45-46. At the time Uvarov was arrested, the officers already had the police report. RP 46-47. Police may make arrests for felonies occurring outside their presence if they have probable cause. RCW 10.31.100. Since they knew of the police reports, their arrest was based on probable cause.

2. The Defendant's Trial Was Within The Proper Time For Trial Limits In CrR 3.3.

Defendant was arraigned on 05-17-2012.² Defendant was in custody, making expiration 60 days from the date of arraignment, or 07-16-2012.³ CrR 3.3(b)(1)(i). Trial was set on 07-09-2012.⁴

On 06-21-2012, the State brought a motion to continue the trial date due to the unavailability of the investigating officer, Detective Hughes. RP 06-21-2012, page 2⁵. The Court granted a good cause continuance. RP 06-21-2012, page 3. The Court stated on the record that the reason for granting the continuance was that both parties have a right to have their witnesses available and present. RP 06-21-2012, Page 2-3.

CrR 3.3(e)(8) allows for a continuance for unavoidable circumstances. The unavailability of a material witness is a valid ground for continuing a trial when there is a valid reason for the witness's unavailability, the witness will become available within a

² Clerk's Minute Entry, Arraignment, Sub No. 8. The State/Respondent filed a supplemental Designation of Clerk's papers to support it's argument in response to the Appellant's Pro Se Statement of Additional Grounds. This Responsive Brief is due before the State will receive the paginated Supplement Designation of Clerk's papers, so the State is referencing the Superior Court Sub No. of the document cited.

³ Clerk's Minute Entry, Arraignment, Sub No. 8.

⁴ Clerk's Minute Entry, Arraignment, Sub No. 8.

⁵ Clerk's Minute Entry, State's Motion for Continuance of Trial, Sub No. 16.

reasonable time, and there is no substantial prejudice to the defendant. *State v. Jones*, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003). The unavailability of police officers is one of those circumstances. *State v. Jones*, 117 Wn. App. At 729.

Applying *Jones* to the case at bar, Detective Hughes, the primary investigative officer, was unavailable due to a scheduled vacation from July 6, 2012, to July 18, 2012.⁶ The trial was continued from 07-9-2012 to 07-24-2012, a period of only two weeks, so Detective Hughes could become available within a reasonable amount of time. The defendant was not prejudiced in his defense because he did not put on a defense. RP 79. No prejudice is alleged in the Appellant's Brief. The defendant therefore had a timely trial under CrR 3.3.

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⁶ Clerk's Minute Entry, State's Motion for Continuance of Trial, Sub No. 16.

III. CONCLUSION

For the reasons argued above this court should affirm Uvarov's conviction.

RESPECTFULLY submitted this 21 day of March, 2013.

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by: 
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Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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